

REMARKS/ARGUMENTS

The election/restriction requirement dated April 18, 2007 has been considered. The Applicant traverses the species election requirement of two species and 13 subspecies. The Applicant provisionally elects claims 1-4, 6, 14, 20-45, 49, 50, 52-62, 65-72, 74, 81-102 and new claims 103 and 104 of Species I (monitoring a physiological or body-related condition) and subspecies B (monitoring a respiratory condition). The Office Action identifies claims 1-3, 20-43, 53-58, 66-71, and 80-102 as generic. Applicant respectfully asserts that claims 1-3, 20-44, 50, 52-59, 65-71, 81-102 are generic and are not drawn to any particular species or subspecies, and should be examined accordingly.

Having complied with 35 U.S.C. § 121, the Applicant respectfully assert that species election requirement is in error because: 1) embodiments restricted to different species are not mutually exclusive (See, MPEP § 806.04(f)); 2) embodiments directed to different species and subspecies overlap in scope (See, MPEP § 806.04(f); and 3) the Examiner has not met the burden required by the MPEP to establish that the inventions are independent or distinct (See, MPEP § 808.01(a)); and 4) the Examiner has not explained why there would a serious burden on the Examiner if restriction is not required. (See, MPEP § 808.01 (a) and § 808.02).

Restriction between species is proper if the species are mutually exclusive. MPEP § 806.04(f). The Examiner fails to explain why any of the identified species and subspecies would be mutually exclusive with respect to one another. The Applicant respectfully submits that some or all of the identified species and subspecies are disclosed as capable of being incorporated into a single embodiment and practiced together to predict disordered breathing. Accordingly, the species and subspecies are not mutually exclusive and the species restriction amongst them is improper.

The election of species requirement is in error because the claims directed to some of the subspecies identified by the Examiner overlap in scope. For example, a patient history condition may be any of the identified species or subspecies conditions, such as a physiological condition, a non-physiological condition, a respiratory condition, a cardiovascular condition, a nervous system condition, etc. For example, a patient may have a history of asthma which would be a historical condition that is a respiratory condition. As

another example, a patient may have a history of working in an asbestos factory, which is a historical condition that is also an environmental condition. As yet another example, a patient may have a history of heart failure which would be a historical condition that is a cardiac or cardiovascular system condition. Therefore, various claims directed to different species and subspecies overlap in scope making the election of species requirement impermissible. For example, claim 17, corresponding to subspecies I-G overlaps in scope claim 5 (subspecies I-A), claim 6 (subspecies I-B), claim 7 (subspecies I-B), claim 8 (subspecies I-C), claim 9 (subspecies I-D), claim 10 (subspecies I-E), claim 11 (subspecies IF), and also overlaps the scope many other claims.

Similarly, a patient-reported condition overlaps any of the identified species and subspecies. For example, a patient may report reduced or improved sleep quality, reduced or improved respiration quality, may report environmental conditions, or other conditions. As an example, a patient may report that she or he is sleepy during the day, which is a patient-reported condition that is also a sleep quality condition. A patient may report exposure to dust or smoke or other environmental factors, such that the patient reported condition is an environmental condition. As reflected in the claims, for example, claim 18, corresponding to subspecies I-H overlaps in scope claim 5 (subspecies I-A), claim 6 (subspecies I-B), claim 7 (subspecies I-B), claim 8 (subspecies I-C), claim 9 (subspecies I-D), claim 10 (subspecies I-E), claim 11 (subspecies IF), and also overlaps the scope of other claims. In addition, a patient reported condition may be a patient history condition, because a patient may provide or report his or her patient history.

Applicant requests that the requirement for species election between monitoring a patient-reported condition (identified as subspecies I-H) and all other species and subspecies be removed and also requests that the requirement for species election between monitoring a patient-history conditions (identified as subspecies I-G) and all other species and subspecies be removed. These species election requirements are clearly improper because the claims directed to the various species and subspecies overlap in scope.

In order to establish reasons for insisting upon restriction, the Examiner must explain why there would be a serious burden on the Examiner if restriction is not required. (See, MPEP § 808.01(a) which references MPEP § 808.02). To comply with this requirement, the

Examiner must show by appropriate explanation one of the following (A) separate classification; (B) separate status in the art when they are classifiable together, or (C) a different field of search. (MPEP § 808.02).

In support of the restriction requirement, the Examiner merely states that “[t]he species are independent or distinct because they monitor non-related parameters and require different equipment.” (Office Action, Page 2). As previously asserted in arguments provided above, these parameters are not necessarily “non-related,” and some subspecies overlap in scope other species and subspecies, and none of the identified species and subspecies are mutually exclusive. The Examiner has not provided any explanation as to why there would be a serious burden if restriction was not required with regard to the species and subspecies identified in the Office Action as required by MPEP § 808.01(a) and § 808.02.

For at least the reasons provided above, the election of species requirement is in error and must be withdrawn. Applicant respectfully requests reconsideration and withdrawal of the requirement for restriction.

Applicant appreciates the indication by the Examiner that each of the identified species and subspecies represent patentably distinct inventions. In this response, the Applicant is directing arguments to the limited issue of the lack of proper grounds supporting the restriction of the Applicant’s claims for examination purposes. As such, the Applicant’s characterization of the claimed subject matter as it may pertain to the issue of distinctiveness within the context of restriction practice is not to be construed as an admission that the claimed inventions are obvious over each other within the meaning of 35 U.S.C. § 103.

Authorization is given to charge Deposit Account No. 50-3581 (GUID.088PA) any necessary fees for this filing. If the Examiner would find it helpful to discuss this issue by telephone, the undersigned attorney of record invites the Examiner to contact the attorney of record.

Respectfully submitted,

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